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NO.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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In the Supreme Court of the United States

OCTOBER TERM, 1983

DELTON H. CASON

Petitioner

VERSUS

DIAMOND M DRILLING COMPANY, AND UNION OIL COMPANY OF CALIFORNIA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA STATE SUPREME COURT

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Attorney for Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La.

QUESTION PRESENTED FOR REVIEW

The sole issue is whether or not a State Court sitting as an Admiralty Court is bound by the admiralty laws of the United States.

LIST OF INTERESTED PARTIES

Diamond M Drilling Company is a company owned by Kaneb which is a publicly-traded corporation.

Union Oil Company of California is a publicly-traded corporation.

TABLE OF CONTENTS

PAGE

Questions Presented For Review i
List of Interested Parties ii
Table of Contents iii
Table of Authorities iv
Decisions Below 1
Jurisdiction 2
Statutes Involved 2
Statement of the Case 3
Argument 5
Conclusion 6
Certificate of Service 7
Appendix A A-1
Appendix B A-2
Appendix C A-3
Appendix D A-5
Appendix E A-24
Appendix F A-51

TABLE OF AUTHORITIES

CASE PAGE

46 U.S.C. 688 2

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DECISIONS BELOW

The Supreme Court of the State of Louisiana denied Supervisory Writs for the First Circuit Court of Appeal on November 18, 1983. A copy of that Order as to Union Oil Company is attached as Appendix "A" and a copy of that order as to Diamond M Drilling Company is attached as Appendix "B". Applications for rehearing to the First Circuit Court of Appeal, State of Louisiana were denied on September 7, 1983 and are attached as Appendix "C". The decision of the First Circuit Court of Appeal, State of Louisiana was lodged on August 23, 1982. A copy of that Judgment and decision is attached hereto and is marked Appendix "D". The opinion of the First Circuit Court of Appeal is reported at 423 So.2d 108. The Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana,

rendered its Judgment and Reasons for Judgment, the first Judgment was dated September 2, 1981 and was supported by Reasons for Judgment of the same date. These are attached as Appendix "E". The second Judgment entered by the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana is dated February 2, 1982 and is attached as Appendix "F".

JURISDICTION

The District Court, Parish of St. Mary, State of Louisiana, originally entered Judgment on September 4, 1981. After a partial new trial, a second Judgment was entered on February 2, 1982. A Devolutive Appeal was taken and the Court of Appeals, First Circuit, State of Louisiana, vacated the Judgment of the District Court and entered Judgment based upon new findings of fact by the Court of Appeals. Application for Writs to the Supreme Court of Louisiana were denied on November 18, 1983. The Supreme Court of the State of Louisiana stayed the Judgment of the First Circuit Court of Appeal, State of Louisiana pending application of writs to this Court.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

STATUTES

There is no particular statute involved in this case. The law applicable is the Jones Act, 46 U.S.C. 688, Federal Statute and the Admiralty Laws of the United States as derived from the Constitution.

STATEMENT OF THE CASE

The plaintiff, Delton H. Cason, filed suit under the Jones Act and "Admiralty Laws of the State of Louisiana," for injuries sustained on December 31, 1977 on Diamond M Company's vessel, RIG 99, in the Gulf of Mexico off the Coast of Texas, against Diamond M Drilling Company. This suit was filed on May 30, 1979. Subsequently, on November 29, 1979, the plaintiff amended his suit to plead a claim against Union Oil Company for negligence under the General Maritime law.

The case was tried to a jury on July 7, 8 and 9, 1981 and the jury found in favor of the plaintiff and awarded $493,000.00. The jury found the plaintiff ten (10%) percent contributorily negligent and the Judgment was reduced to $443,000.00. As to the defendants, the jury found that Diamond M was negligent under the Jones Act, but found that its rig was *not* unseaworthy. The jury found Union Oil negligent for failing to properly supervise the work and for furnishing a defective well templet to be used on Diamond M's RIG 99. The jury allotted sixty (60%) percent negligence to Diamond M and forty (40%) percent negligence to Union Oil pursuant to the Admiralty Laws of the United States.

Additional issues included prejudgment interest and an indemnity agreement between Union Oil and Diamond M which issues were taken under advisement by the district judge. The district judge concluded that prejudgment interest would not be awarded and awarded indemnity to Union Oil in the amount of $100,000.00 based upon the contract between Diamond M and Union Oil. The district court applied Texas law to the contract. Diamond M and Union Oil both moved for a new trial. Diamond M's

motion was denied and Union Oil was granted a new trial. Diamond M objected to the retrial of the case to Union Oil only, because the issues were so entwined that the second jury could not properly decide the case unless the entire case was retried. The jury on the second trial found Union Oil free of negligence and the district judge, without authority, assessed a forty (40%) percent negligence, assessed by the first jury against Union Oil, against Diamond M.

The district court then took under advisement court costs and prejudgment interest. Despite the Court's statement that prejudgment interest would not be awarded, in the judgment of February 2, 1982, prejudgment interest was awarded from July 9, 1981. Diamond M appealed to the First Circuit alleging that the doctrine of unseaworthiness was not properly pled under the General Maritime Law of the United States, the district court was in error in granting a new trial to Union Oil only because the negligence of Union Oil and Diamond M was so interwoven that a fair trial could not be obtained, the damages were excessive because the treating physician testified the plaintiff could return to his previous employment and the plaintiff was engaged as a logger at the time of the trial; and finally, based upon Texas law, the contract between Diamond M and Union Oil did not require Diamond M to indemnify Union Oil for $100,000.00.

Union Oil appealed to the First Circuit, contending that it was entitled to full indemnity from Diamond M and that the case had prescribed, because it was not filed within one year.

Delton H. Cason appealed to the First Circuit contending that the second trial as to Union Oil was improper,

and that the ten (10%) percent contributory negligence applied to the plaintiff was "clearly erroneous."

The First Circuit found that the claim against Union Oil was not untimely, in that laches applied, because Federal Law applied to a maritime claim; the district court erred in finding a new trial to Union Oil only; the First Circuit reinstated the forty (40%) percent negligence against Union Oil Company; the First Circuit found that in a maritime claim brought in State Court, the trial court must have been "clearly erroneous" in order for its holding to be overturned and the finding of negligence against Union Oil was not "clearly erroneous;" that the finding of ten (10%) percent comparative negligence as to the plaintiff was "clearly erroneous;" and finally, that maritime law governed the contract between Diamond M and Union Oil and that based upon the maritime law, Union Oil was entitled to full indemnity from Diamond M Company.

A rehearing was applied for by Union Oil and Diamond M and both were denied.

Writs to the Supreme Court, State of Louisiana were denied.

ARGUMENT

At the District Court level, the jury found the plaintiff to be ten (10%) percent contributorily negligent. The Court of Appeals First Circuit State of Louisiana reversed the findings of fact of the jury as to the plaintiff's contributory negligence and made the plaintiff whole.

The Appellate Courts of the State of Louisiana under the laws of the State of Louisiana reserve the right to

review the findings of fact of the lower Courts and/or juries and to amend or alter the facts.

CONCLUSION

In this case, the First Circuit Court of Appeal State of Louisiana was sitting as an admiralty court under the laws of the Constitution of the United States. This fact is recognized in the opinion rendered by the First Circuit Court of Appeal State of Louisiana. Sitting as an admiralty court under the laws of the United States, the First Circuit Court of Appeal State of Louisiana, did not have the right to alter or amend the findings of fact of the jury unless those facts were clearly erroneous. The First Circuit Court of Appeal State of Louisiana did not adhere to its responsibility under the Admiralty Laws of the United States but in fact, acted as a typical Louisiana Court of Appeal and reversed the findings of fact of the jury as to the plaintiff's contributorily negligence. It is respectfully submitted that had the First Circuit Court of Appeal State of Louisiana acted as an Admiralty Court under the Laws of the United States that it would not have reversed the findings of fact of the jury as to the plaintiff's contributorily negligence.

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Counsel for DIAMOND M DRILLING COMPANY AND UNION OIL COMPANY OF CALIFORNIA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ were served upon counsel of record in this matter by United States Postal Service, first class postage, properly addressed, on this 16th day of February, 1984.

JOSEPH J. WEIGAND, JR.

APPENDIX "A"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

DELTON H. CASON

VS NUMBER 83-C-2091

DIAMOND M. DRILLING COMPANY ET AL

In Re: Diamond M. Drilling Company et al, applying for writs of Certiorari and/or Review to the First Circuit Court of Appeal, Number 82-CA-0638; 16th Judicial District Court, Parish of St. Mary, Number 60,777

November 18, 1983

Denied.

JCW

JAD

PFC

WFM

JLD

FAB

HTL

Supreme Court of Louisiana
November 18, 1983

Clerk of Court
For the Court

APPENDIX "B"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

DELTON H. CASON

VS NUMBER 83-C-2118

DIAMOND M. DRILLING COMPANY AND
UNION OIL COMPANY OF CALIFORNIA

In Re: Union Oil Company of California, applying for Supervisory Writs to the First Circuit Court of Appeal, Number 82-CA-0638; from the Sixteenth Judicial District Court, Parish of St. Mary, Number 60,777

November 18, 1983

Denied.

JCW

JAD

PFC

WFM

JLD

FAB

HTL

Supreme Court of Louisiana
November 18, 1983

Clerk of Court
For the Court

APPENDIX "C"

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

No. 82-CA 0638

Parish of St. Mary

DELTON H. CASON

vs.

DIAMOND M. DRILLING COMPANY, ET AL

On Applications For Rehearing.

Rehearings Denied

Baton Rouge, Louisiana Sep. 7, 1983

(Signed) _____
Edwards, J.

(Signed) _____
Watkins, J.

(Signed) _____
Shortess, J.

Filed Sep. 7, 1983

_____
Clerk

I hereby certify this document was mailed to: William Baggett, Joseph Weigand, & Raymond Allen, Attys. This Date Sep. 7, 1983

/S/Karen West

Dp. Clerk of Court

APPENDIX "D"

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT
P.O. Box 3237
Baton Rouge, Louisiana 70821

DATE: OF LODGING: August 23, 1982
Docket Number: 82 CA 0638

DELTON H. CASON

VERSUS

DIAMOND M. DRILLING CO., ET AL

NOTICE OF JUDGMENT

TO:

William B. Baggett, Atty.
Joseph J. Weigand, Jr., Atty.
Raymond Morgan Allen, Atty.

Dear Sirs:

You are hereby served with a copy of the opinion in the above case in which you are an attorney of record.

Your attention is invited to the amended Rule XI of the Uniform Rules of the Courts of Appeal. Please note Article 2166 of the Code of Civil Procedure, as amended effective January 1, 1978.

CLERK OF COURT

I hereby certify this notice of judgment was mailed to the above listed attorneys and/or parties this date Jun 28, 1983.

/S/Karen West
DP. CLERK OF COURT

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. 82 CA 0638

DELTON H. CASON

VERSUS

DIAMOND M DRILLING COMPANY, ET AL.

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. MARY, HONORABLE ROBERT E. JOHNSON, JUDGE PRESIDING.

BEFORE: EDWARDS, WATKINS AND SHORTESS, JJ.

WATKINS, J.

This is a personal injury action brought by Delton H. Cason against Diamond M Drilling Company and Union Oil Company of California for injuries sustained by Cason when a well guide or templet on which Cason was engaged in welding fell into the Gulf of Mexico from a jackup rig, Diamond M 99. Diamond M had drilled a well from the rig, which was in the process of being plugged and abandoned. Cason was on the well guide cutting gussets with a welding torch, carrying out his duties as a maintenance welder employed by Diamond M, when the well guide fell into the Gulf. Union Oil owned the well guide and gussets, as well as the drive shaft to which the gussets were attached.

Union Oil filed a third party demand against Diamond M, seeking indemnification under a contract allegedly providing for indemnity, if Union Oil was found liable.

Suit was originally filed in Cameron Parish. The case was transferred to St. Mary Parish before trial after the filing of an exception of improper venue by Diamond M. Thereafter, Diamond M again filed an exception of improper venue,[1] and Union Oil filed an exception of lack of jurisdiction over the subject matter, as the rig upon which the accident had occurred had been located near Texas territorial waters off High Island, Texas. Also, exceptions of prescription or laches were filed by both defendants. All exceptions were overruled and the case proceeded to trial on the merits, which took place before a jury on all issues, except indemnity. The sole basis for possible liability of Diamond M was under the Jones Act (as Cason's employer) and the sole basis for possible liability of Union Oil was under the general maritime law of negligence.

The jury returned a verdict finding Cason 10% negligent, and "using 100% as the total amount of negligence by the defendants" found Diamond M 60% negligent and Union Oil 40% negligent. Total damages to plaintiff were assessed by the jury in the amount of $493,000.00. Union Oil and Diamond M filed motions for a new trial or remittitur. Only Union Oil was granted a new trial, which was limited to the question of the liability of Union Oil. A new trial was held before a separate jury on this issue, which found Union Oil not negligent under the general maritime law, and hence not liable. The trial court, based upon the jury's finding of 10% comparative negligence on the part of Cason, rendered judgment in favor of Cason and against Diamond M in the sum of $443,700.00. From the judgment Diamond M and Cason Appealed. We affirm in part and reverse in part.

[1] Diamond M also filed an exception of no right of action which was overruled by the trial court. No appeal from that ruling was taken.

FACTS

Cason, who was previously employed as a bench welder and as a logger, had only a high school education. At the time of the accident, he was in his early thirties, and was employed as a maintenance welder.

The rig on which Cason was employed was owned by Diamond M, which as an independent contractor had undertaken to drill the well in question for Union Oil by modification of a prior agreement to drill a well in a different location (at Main Pass) for Mobil Oil. A Union Oil representative was on the rig, Dennis Romero, who was a graduate petroleum engineer, and who had general supervision over the tool pusher, Ken Smith. Romero testified at both the original trial and the new trial, but Smith could not be located to testify.

Diamond M had drilled a well for Union Oil from the rig in question, which operated from a movable drilling barge with jackup legs. The well was being plugged and abandoned. On the date of the accident on or about December 31, 1977, the well guide, which was used to guide the drive shaft, had been lifted from the ocean floor. The well guide was a 5 or 6 ton steel girder box which was held up, once lifted from the water, by gussets attached to the drive shaft both at the top and bottom of the box-like well guide. It was necessary to cut the gussets to salvage the well guide, which, as we have said, belonged to Union Oil. Cason, the maintenance welder, and a worker named Stelly, were assigned the task of cutting the gussets.

Smith explained the procedure to Romero. Romero had no experience in retrieving well guides, although he had had several years practical experience in working on

drilling rigs. After hearing Smith's explanation, Romero agreed to the procedure. The bottom gussets were to be cut first. The well guide was to have a secondary support from two air hoists, the lines of which ran near the edge of the Texas Deck, which lay immediately below the drilling deck.

When Cason was assigned the task of cutting the gussets, he expressed apprehension to both Smith and Romero, but Smith assured him the procedure was safe. Cason was lowered to the well guide.

The air hoist lines if left taut would brush the sides of the Texas Deck. For this reason the lines were left slack until pads could be placed at the ends of the Texas Deck to cover the sharp edges of the deck. Although Romero was on the Texas Deck for about ten minutes, he failed to observe that the lines were not taut.

Cason started to cut the bottom gussets, and while he was in the act of cutting the last bottom gusset, the gussets on the top or the supports leading from the top gussets to the well guide gave way, and the entire weight of the well guide fell on the air hoist lines, which also gave way because they were slack. The well guide plummeted to the Gulf, which was about 30 or 40 feet below, carrying Cason and Stelly.

Cason blacked out momentarily while he was falling, but after going beneath the surface of the Gulf, to a considerable depth, rose to the surface. Both Cason and Stelly were saved.

Cason suffered a compression fracture of the first and second lumbar vertebrae. He also suffered a burst ear drum. He was taken to John Sealy Hospital in Galveston,

and then placed under the care of Dr. Don H. Burt, an orthopedic surgeon in Shreveport. Following Dr. Burt's advice, Cason attempted to return to work, but had to stop working after a short time because of intense pain, which was caused by assuming awkward positions while welding. Cason thereupon started logging with his father, at a considerable reduction in wages. He appears to have been engaged in logging up to the time of the trial.

The appeals raise practically the entire range of issues considered by the trial court, including the exceptions.

EXCEPTIONS

The present action seeking recovery under the Jones Act and general maritime law is brought under the "saving to suitors" clause of 28 USC § 1333, which saves to suitors, bringing an in personam claim seeking relief under the laws of admiralty, a remedy in a "common law" (i.e., non-admiralty) court. In an action brought in state court under the "saving to suitors" clause, federal substantive law applies, but where the result is not substantially affected, the procedural law of the forum applies. *Lavergne v. Western Co. of North America, Inc.*, 371 So.2d 807 (La. 1979), Gilmore and Black on Admiralty, §§ 1-13 (2d ed. 1975). As the forum is the District Court of Louisiana, this State's procedural law applies in all aspects of the present case where the result is not substantially affected.

Jurisdiction and venue are quite obviously matters that are governed by Louisiana law in the present case. Diamond M is a foreign corporation authorized to do business in Louisiana, having an agent for service of process in this state. Therefore, LSA-C.C.P. art. 42(4) applies

in determining whether or not venue lies in St. Mary Parish, Louisiana:

> "The general rules of venue are that an action against:
>
> ***
>
> (4) A foreign corporation licensed to do business in this state shall be brought in the parish where its principal business establishment in the state is located, as designated in its application to do business in the state;"

It appears to be agreed by all parties that the principal place of business of Diamond M in this state is in St. Mary Parish. Therefore, venue lies in St. Mary Parish.

As to Union Oil's exception of lack of subject matter jurisdiction, the trial court obtained jurisdiction over the person of both Diamond M and Union Oil. A Louisiana court which has jurisdiction over the person and which has before it a "saving to suitors" action brought in personam under the Jones Act and general maritime law clearly has jurisdiction over the subject matter. See LSA-C.C.P. art. 2. Thus, there is no merit to Union Oil's exception of lack of subject matter.

As to the pleas of prescription and laches, these are substantive matters, to which federal law applies. The statute of limitations under the Jones Act is 3 years. Laches applies to a general maritime claim. The accident occurred on or about December 31, 1977. Cason filed suit in state court against Diamond M on May 30, 1979. A suit had earlier been filed in Federal court against both Diamond M and Union Oil, which was dismissed without prejudice on May 16, 1979. Plaintiff filed a pleading styled

"Second Supplemental and Amending Petition" in state court naming Union Oil as an additional party defendant on November 29, 1979.

Clearly, the 3 year statute of limitations under the Jones Act had not expired. Especially in view of the fact that an earlier suit had been filed in Federal court against both Diamond M and Union, we find that the equitable doctrine of laches is inapplicable to the maritime claim.

NEW TRIAL

Diamond M and Cason contend that a new trial should not have been granted to Union Oil, because (1) a new trial may be granted only if the jury's finding is contrary to the "great weight" of the evidence (*Narcisse v. Illinois Central Gulf Ry. Co.*, 620 F.2d 544 (5th Cir. 1980)), and (2) the respective liabilities of Union Oil and Diamond M were so intertwined that a new trial should not have been granted as to one only. Because we agree with the second contention, we find it unnecessary to consider the merits of the first.

Applying the admiralty doctrine of comparative negligence, the jury in the first trial, as we have stated, found Diamond M 60% negligent, Union Oil 40% negligent as between the two defendants, and Cason 10% negligent. Granting a new trial to determine the negligence vel non of Union Oil inevitably affected the percentage of comparative negligence for which Diamond M would be held liable under the Jones Act. As stated in Moore's Federal Practice, Vol. 6, § 59.06 at pp. 59-80, and the cases cited therein, a partial new trial cannot be granted if the issues as to which the partial new trial is ordered are so intertwined with issues as to which it is not ordered that the partial

new trial cannot be held without substantial injustice resulting therefrom. We find the granting of the new trial in the present case to have resulted in serious injustice to Diamond M, as the question of the comparative negligence of Diamond M was determined although it was not granted a new trial, and although the relative or comparative percentages of liability of Diamond M and Union Oil were bound one by the other.

As we find a partial new trial was improperly granted, we are limited to the transcript of the proceedings of the first trial in our review, and it is to that transcript that we shall confine our further consideration.

LIABILITY OF DIAMOND M

Diamond M was clearly negligent through its tool pusher, Ken Smith, in having ordered Cason to cut the gussets above the Gulf, especially in view of the fact that the well guide was not properly secured. We affirm the finding of negligence on the part of Diamond M.

LIABILITY OF UNION OIL

The original jury found Union Oil to have been 40% negligent.

In a maritime claim brought in state court, the trial court must have been "clearly erroneous" in order for its holding to be overturned. *Rivers v. Schlumberger Well Surveying Corp.*, 389 So.2d 807 (La. App. 3d Cir. 1980); *Portier v. Texaco, Inc.*, 426 So.2d 623 (La. App. 1st Cir. 1983).

The finding that Union Oil was 40% negligent, which

was arrived at by the jury in the original trial, was not clearly erroneous, but was supported by the great weight of the evidence. Union Oil was negligent, in the first instance, in stationing a company representative to supervise retrieval of a well guide who had no experience with that type of procedure. Furthermore, Romero, the company representative actually so stationed, was himself guilty of negligence. Romero approved the outline of the procedures described to him by the tool pusher, Ken Smith, with regard to cutting the gussets. Romero was on the Texas Deck and should have seen that the secondary supports for the well guide in the event the upper gussets were to fail, viz. the air hoist lines, were not taut, but slack, and hence, also likely to fail in the event the upper gussets were to fail. Romero was on the Texas Deck for some 10 minutes and failed to inspect that aspect of the procedure. If Romero would have had proper and sufficient experience, or had refused to approve the procedure, or had demanded the air hoist lines be taut, the accident would not have occurred. Clearly, a finding of 40% negligence on the part of Union Oil is justified by the record.

NEGLIGENCE OF CASON

Applying comparative negligence under admiralty law, the first jury found Cason 10% negligent. This finding was clearly erroneous.

The duty of a seaman, such as Cason, is not to find the safest method for doing the work, but to do the work assigned. The seaman's duty to protect himself is slight. *Bobb v. Modern Products, Inc.*, 648 F.2d 1051 (5th Cir. 1981).

Cason worried aloud of the dangers of cutting the

gussets in his conversations with both Romero and Smith. Smith assured him the procedure was safe, and in effect, ordered Cason to perform the task. Cason had no choice but to perform the task as assigned. There is nothing that would indicate he violated instructions, or failed to perform the assigned task in the safest possible manner. The jury was clearly erroneous to have found any contributory negligence on the part of Cason, in any percentage at all. Accordingly, we hold Cason free from negligence.

QUANTUM

After Cason sustained his injury and was discharged from treatment by Dr. Burt, Cason attempted to return to his old job as a maintenance welder for Diamond M. After a brief time, he found that he could not perform his duties without suffering intense pain, as he was required to assume awkward postures, principally crouching, while welding. For that reason, Cason quit his job as welder, and went to work for his father as a logger near his family home at Campti, Louisiana. He works only part time, because of pain. However, the pain is somewhat less in logging, in which he can kneel, than in welding, in which he is required to crouch.

Cason's earnings as a logger are considerably less than his earnings received when his physical condition permitted him to weld. Cason called Donald Cornwell of the Economics faculty at the University of Southwestern Louisiana to testify as to past and future loss of earnings. Mr. Cornwell testified that the loss of earnings from date of accident to date of trial was $61,048.97, bearing in mind that he worked for Diamond M as a maintenance welder briefly and as a logger on a rather permanent basis during this period. As to future loss of earnings, Mr. Cornwell testified

that Cason's work life expectancy, at date of trial, was 30.15 years. Using this figure, Mr. Cornwell testified that future loss of earnings, assuming Cason were to continue to work as a logger, would come to $239,706.72, without consideration of inflation. The total figure would thus be $300,755.69. If Cason were to receive only the minimum wage, rather than wages as a logger, his total loss of earnings would come to $467,718.97.

The jury found total damages to plaintiff in the amount of $493,000. The interrogatories submitted to the jury did not permit the jury to break this sum down. Cason testified that he continued to suffer pain up to the date of the trial. Dr. Burt, the treating physician, testified that he had no reason to doubt the veracity of Cason's statement that he continued to experience pain as a result of the injury to his back. He testified that in his opinion Cason had sustained a permanent disability to the entire body of 15 to 35% as a result of the accident. He further testified that the American College of Orthopedic Surgeons would place the disability of the entire body at 25%. A specialist who saw Cason on two occasions as an examining physician, Dr. Norman H. Morin of New Orleans, likewise testified that Cason continued to experience pain, and should not return to any type of work requiring bending, as to do so would inevitably cause his condition to worsen.

Thus, Cason experienced severe pain, and will continue to experience pain, in all likelihood, the remainder of his life. Considering the pain and suffering, and partial future loss of income, we do not find the jury's assessment of the loss to be excessive.

Defendants contend that the testimony of Dr. Burt and Dr. Morin was in conflict, as Dr. Morin seemed to think

that Cason should not return to his job as maintenance welder while Dr. Burt released Cason to return to his job in that capacity. Defendants cite the well-known proposition that the testimony of the treating physician is to be preferred to that of a physician who examines the injured person only once or twice. *Lockhart v. Pargas, Inc.*, 271 So.2d 664 (La. App. 1st Cir. 1972), writ refused 273 So.2d 844 (1973). *Knighten v. AM Amusement Co.*, 272 So.2d 60 (La. App. 4th Cir. 1973). The statement that the physicians' testimony is in conflict glosses over the essential similarity of their respective findings. Taking their testimony as a whole, we see from a reading of the transcript that both Dr. Morin and Dr. Burt thought Cason has sustained permanent damage to the discs lying between the compressed vertebrae, and both believed him to be in pain at their last examination. Neither physician was an expert in the requirements of the duties of a maintenance welder. Cason testified that because he was required to assume a crouching position while welding, he could not perform his duties as maintenance welder without severe pain. The trier of fact has to weigh both medical and lay testimony in assessing damages, and considering the credibility and the relative qualifications of the experts and the credibility of all witnesses, to arrive at a result. *Touchet v. Fidelity and Cas. Co. of New York*, 264 So.2d 752 (La. App. 3d Cir. 1972); *Guidry v. Davis*, 382 So.2d 250 (La. App. 3d Cir. 1980).

The trial court's charge to the jury contained the following statement:

> "You as members of the jury are entitled to give greater weight to the opinion of a treating physician than that of a physician who has not examined the patient, or who has examined the patient

or purposes of evaluation only. However, you are entitled to give credibility to the testimony of any witness as you think it deserves."

We cannot say, in the light of the law, that this portion of the charge to the jury was in error, or, in light of the great weight of the medical and lay testimony that Cason was still in pain, or especially Dr. Burt's testimony that Cason had sustained a 15% to 35% permanent disability of the entire body as a result of the accident, that the jury's assessment of damages was clearly erroneous. See *Rivers v. Schlumberger Well Surveying Corp., supra.*

The trial court limited the award of damages to Cason to the sum of $443,700.00, because of the jury's finding of 10% negligence on the part of Cason. As we have found Cason not to have been negligent at all, we increase the total award to the full sum of $493,000.00. The percentages of negligence shall be apportioned between Diamond M and Union Oil as set forth below:

LIABILITY

As we find that Cason was not negligent in any degree, it follows that 60% of the total negligence is attributable to Diamond M, and 40% of the total negligence is attributable to Union Oil.

However, the original drilling contract, entered into between Diamond M and Mobil Oil Corporation, under date of February 21, 1977, contained an indemnity clause in favor of Mobil in which Diamond M agreed to hold Mobil harmless from death, injury, or property damage arising out of the performance of the contract. This contract

provided for Diamond M to drill a well at Main Pass Block 72 - 74 #2. By letter from Mobil to Diamond M, dated August 25, 1977, with copy to Union Oil, it was stated that pursuant to telephone conversation, Diamond M was to drill a well under the same drilling contract in Union-Mobil High Island Block A-443, with Union as operator. The signature of a representative of Diamond M appears at the bottom of the letter approving the agreement. The letter states that the agreement "will fulfill commitments" of both parties. Both Diamond M and Union agree that by virtue of this letter all provisions of the drilling contract, including the indemnity provisions, were made applicable in favor of Union Oil against Diamond M.

The indemnity and insurance provisions of the contract between Mobil and Diamond M, the rights under which, as we have stated, were made applicable in favor of Union Oil, read in their entirety as follows.

"14. INSURANCE AND INDEMNITY

14.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in excess of the requirements detailed in Exhibit B attached hereto and made a part hereof.

14.2 All insurance shall be carried in a company or companies acceptable to Mobil and shall be maintained in full force and effect during the term of this agreement, and shall not be canceled, altered, or amended without ten (10) days prior written notice having first been furnished Mobil. Upon request Mobil shall be furnished certified copies of all such insurance policies.

14.3 In the event Contractor is a self-insurer

and Mobil has consented to Contractor's being a self-insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement. It is recognized that Contractor is self-insured for $250,000.00 of Workmen's Compensation and General Liability.

14.4 Contractor shall protect, indemnity [sic] and save Mobil harmless against any and all claims, demands and causes of action of every kind and character made against Mobil or in which Mobil may be named party defendant by Contractor's employees, agents, or invitees, on account of personal injury or death, or on account of property damages (other than property damages specifically provided for in paragraphs 6.1, 6.2 and 6.3) occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, irrespective of whether such claims are occasioned, brought about, or caused in whole or in part by the negligence of Mobil, or by the unseaworthiness of the Diamond M 99, and for damages for infringement of any patent as more particularly set forth in Paragraph 22 hereof."

Paragraph 14.4 clearly obligates Diamond M to indemnify Mobil, and thereby Union Oil, from all claims against Mobil (Union Oil) arising out of property damages, personal injury, or death, in the performance of the contract, even claims arising in whole or in part from the negligence of Mobil. Thus, the contract, unless limited by state or admiralty law, obligates Diamond M to indemnify Union Oil fully from all claims Cason has against Union Oil arising out of the accident sued upon, even though, as in the present case, the accident resulted in part from the

negligence of Union Oil.

The trial court applied Texas statutory law to the indemnity agreement, and limited Union Oil's right to indemnity to $100,000.00 under effect of Texas law. The provisions of Texas Revised Civil Code Annotated, Article 2212, would, generally stated, have the effect of limiting liability of a drilling contractor under an indemnity clause to the amount agreed to be covered by insurance. Louisiana, after the date of the accident sued upon, adopted an even broader statute, voiding indemnity provisions in such circumstances. See LSA-R.S. 9:2780, added Act No. 427 of 1981, amended 1981, 1982.

However, we find that neither Louisiana law nor Texas law applies, but as the contract between Diamond M and Mobil (Union Oil) is a maritime contract, the admiralty law affecting indemnity contracts as applied by courts in the United States applies. See *A/S J. Ludwig Mowinckels Rederi v. Commercial Stevedoring Co.*, 256 F.2d 227 (2nd Cir. 1958); *Hudson Waterways Corp. v. Coastal Marine Service, Inc.* 436 F.Supp. 597 (E.D. Tex. 1977).[2] These cases

[2] Cf. *Dickerson v. Continental Oil Co.*, 449 F.2d 1209 (5th Cir. 1971), which held that the Outer Continental Shelf Lands Act, 43 U.S.C.A. Sec. 1331 et seq., made Louisiana law applicable to an indemnity agreement affecting a fixed drilling platform because the fixed drilling platform was not a "vessel". The case of *Hicks v. Ocean Drilling and Exploration Co.*, 512 F.2d 817 (5th Cir. 1975) held that Louisiana law applied to an indemnity agreement, relying solely upon *Dickerson* as authority although it found the movable storage tank therein involved to be a "vessel". If *Dickerson* had been interpreted properly, Louisiana law would not have been applied in *Hicks*, as in *Hicks* the indemnity agreement involved a "vessel", which is clearly excluded from the Outer Continental Shelf Lands Act, to which the reasoning in *Dickerson* is limited. Clearly the drilling barge involved in the present case was likewise a "vessel", and Federal law, not Louisiana law adopted as Federal authority by the Outer Continental Shelf Lands Act, applies to the present indemnity agreement.

recognize the need for uniformity between the laws affecting indemnity under maritime contracts, and clearly and squarely hold that the Federal admiralty law affecting indemnity contracts is to be applied. *Hudson Waterways* states that clauses in maritime contracts containing indemnity or release from liability provisions which indemnify the indemnitee for the consequences of its own negligence are to be fully enforced, with but one exception, towing contracts. In these contracts release from liability clauses providing indemnity for the indemnitee's negligence are denied any effect whatsoever as a matter of public policy. The towing contract exception with regard to release clauses was first clearly recognized in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955), as a matter of public policy, for two main reasons, the court stated, (1) to discourage negligence and (2) to protect those who are unable to negotiate on equal terms with towing companies. It is true that drilling companies often do not negotiate on equal terms with major oil companies in entering into contracts to drill wells, and Bisso's policy consideration clearly lies behind the Louisiana and Texas statutes cited above. However, under *Ludwig, supra*, and *Hudson Waterways, supra*, the statutes of these states are inapplicable, and we are reluctant indeed and unwilling to create an additional exception to the general rule of the federal courts that indemnity clauses in admiralty contracts shall be enforced as written where, as in this contract, the language of the indemnity provision is clear and unequivocal.

We, therefore, give effect to paragraph 14.4 of the drilling contract between Mobil and Diamond M obligating Diamond M to indemnify Mobil, and, by subsequent agreement, Union Oil, from any claim from personal injury, death, or property damage made against Mobil (Union Oil).

Thus, Union Oil must be indemnified by Diamond M to the full extent of its liability to Cason arising out of the accident sued upon.

DECREE

For the reasons set forth above, we set aside and vacate the judgment of the trial court, and render judgment:

(1) In favor of Delton H. Cason, and against Union Oil Company of California, for 40% of $493,000.00, or $197,200.00, together with legal interest from July 9, 1981.

(2) In favor of Delton H. Cason, and against Diamond M Drilling Company, for 60% of $493,000.00, or $295,800.00, together with legal interest from July 9, 1981.

(3) In favor of Union Oil Company of California and against Diamond M Drilling Company, for 40% of $493,000.00, or $197,200.00, together with legal interest from July 9, 1981.

(4) Against Diamond M Drilling Company, for all costs at trial and on appeal.

VACATED AND RENDERED.

APPENDIX "E"

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

DELTON CASON

VS. NO. 60,777

DIAMOND M. DRILLING CO., ET AL:

FILED: SEP 4, 1981
JANE C. PILANT
DEPUTY CLERK

JUDGMENT

This case came on for trial pursuant to regular assignment on July 6, 1981. Present at the trial were William B. Baggett of the firm Baggett, McCall, Singleton & Ranier, and Marvin F. Gahagan, attorneys of record for plaintiff; Joseph J. Weigand, attorney for the defendant DIAMOND M. DRILLING CO.; and Mr. Randall Theunissen, attorney of record for the defendant UNION OIL COMPANY OF CALIFORNIA.

This cause, after having been duly tried before and submitted to the jury, and the jury having returned on July 9, 1981, a verdict in words and figures as follows:

VERDICT OF THE JURY

"1. Was there any negligence under the Jones Act on the part of the defendant, Diamond M, which was the cause of plaintiff's injuries?

Yes X No_____

"2. Was there any unseaworthiness of defendant Diamond M's vessel, RIG 99, which was the proximate cause of plaintiff's injuries?

Yes_____ No X

"3. Was there any negligence under the General Maritime Law on the part of the defendant, Union Oil Company, which was a proximate cause of plaintiff's injuries?

Yes X No_____

"4. What amount of damages, if any, expressed in dollars, did the plaintiff sustain as a result of these injures?

$493,000

"5(a). Was there any negligence on the part of the plaintiff which was the proximate cause of his own injuries?

Yes X No_____

"5(b). If the answer to Question 5(a) is "yes," by what percentage did the plaintiff's negligence contribute to his own injuries?

10%

"Franklin, St. Mary Parish, Louisiana, this 9 day of July 1981.

s/Don R. Goos
FOREPERSON

"Using 100% as the total amount of negligence by the defendants:

"What percentage of negligence do you attribute to Diamond M.

60%

"What percentage of negligence do you attribute to Union Oil.

40%

s/Don R. Goos
FOREPERSON"

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the said verdict be, and it is hereby, made the judgment of this Court. Defendant DIAMOND M. DRILLING CO. is condemned to pay to plaintiff, DELTON CASON, the sum of $266,220.00. Defendant UNION OIL is condemned to pay to plaintiff, DELTON CASON, the sum of $177,480.00.

Matters not submitted to the jury were by stipulation of all parties submitted to the Court for decision. The Court finding in favor of DIAMOND M DRILLING COMPANY and UNION OIL COMPANY OF CALIFORNIA and against DELTON CASON on the question of prejudgment interest and the Court further finding in favor of UNION OIL COMPANY OF CALIFORNIA and against DIAMOND M DRILLING COMPANY to the extent of $100,000.00 on the indemnity agreement, therefore,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of

UNION OIL COMPANY OF CALIFORNIA and against DIAMOND M DRILLING COMPANY in the sum of $100,000.00 with legal interest from date of judgment until paid.

IT IS FURTHER ORDERED that DIAMOND M DRILLING COMPANY and UNION OIL COMPANY OF CALIFORNIA are liable unto plaintiff for legal interest from date of judgment until paid, and for all costs of these proceedings, 75% Diamond M and 25% Union Oil.

IT IS FURTHER ORDERED that the following expert witness fees be taxes as costs:

Paul Montgomery	$350.00
Don Cromwell	$350.00

Judgment read, rendered and signed in Chambers at New Iberia, Louisiana, this 2nd day of September, 1981.

(SIGNED)
JUDGE

RECEIVED AND FILED
SEP 4, 1981
JANE C. PILANT
Dy. Clerk of Court

CLERK'S OFFICE, FRANKLIN, LA.
Received and filed for recordation at 10:30 A.M.
SEP 4, 1981
JANE C. PILANT
Dy. Clerk of Court

STATE OF LOUISIANA
PARISH OF ST. MARY

I, the undersigned Deputy Clerk, 16th Judicial District Court, St. Mary Parish, La., Ex-Offico Recorder thereof, duly commissioned and qualified, do hereby certify the above and foregoing is a true and correct copy of the original judgment rendered 9-2-81, filed in (Civil-~~Probate~~) proceeding No. 60777 and recorded in

COB _____ Entry No. _____ Page _____
MOB 437 Entry No. 151,052 Page 793
CMB _____ Entry No. _____ Page _____

of date Sept. 4th 1981.

IN EVIDENCE WHEREOF, witness my official signature and the impress of the seal of my office this 4th day of Sept. A.D., 1981, at Franklin, St. Mary Parish, La.

/S/JANE C. PILANT
DEPUTY CLERK OF COURT

SIXTEENTH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
NEW IBERIA, LOUISIANA 70560
P.O. BOX 1058

September 2, 1981

Hon. Benny Blakeman
Clerk of Court
St. Mary Parish Courthouse
Franklin, LA 70538

RE: DELTON H. CASON
V. NO. 60777
DIAMOND M. DRILLING COMPANY

Dear Benny:

I enclose herewith Reasons for Judgment and Judgment in the above referenced matter. Please see that all attorneys of record are furnished with a copy of each.

With kindest personal regards, I am,

Very truly yours,

Robert E. Johnson

REJ:dpe

BENNY A. BLAKEMAN
CLERK
SIXTEENTH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
P.O. DRAWER 1231
FRANKLIN, LOUISIANA
September 4th, 1981

MR. JOSEPH J. WEIGAND, JR.
WEIGAND & SIEGRIST
ATTORNEYS AT LAW
P.O. BOX 6062
NO. 7 PROGRESSIVE BLDG.
HOUMA, LOUISIANA 70361

RE: DELTON H. CASON

VS. NO. 60,777

DIAMOND M. DRILLING CO.

Dear Sir:

Enclosed are certified copies of Reasons for Judgment and Judgment rendered by Judge Robert E. Johnson and filed this date in the above captioned proceeding.

Sincerely,

/S/ JANE C. PILANT

Deputy Clerk of Court

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

DELTON H. CASON

VERSUS NO. 60777

DIAMOND M. DRILLING CO.

COUNSEL FOR PLAINTIFF:

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COUNSEL FOR UNION OIL CO.

RANDALL THEUNISSEN
Allen, Gooch & Bourgeois
P.O. Box 3204
Lafayette, LA 70502

REASONS FOR JUDGMENT

This case was tried to a jury July 6th through July 9th, 1981, in Franklin, St. Mary Parish, Louisiana. Suit was originally filed in the 38th Judicial District Court of the Parish of Cameron, in Cameron, Louisiana, and, in the Lake Charles Division of the Federal District Court for the Western District of Louisiana. Subsequently, on objections to the venue in Cameron, the suit was ordered transfered to the 16th Judicial District Court for St. Mary Parish, Louisiana. The principal defendant, Diamond M Drilling Company, has its principal place of business in Louisiana at Morgan City, St. Mary Parish, Louisiana. Previously, while the matter was still pending in Cameron Parish, suit in Federal Court in Lake Charles was dismissed, without prejudice, because of an Exception of Lis Pendens filed in the Cameron suit by defendant, Diamond M. Numerous exceptions were filed in the matter but were not heard, nor strenuously urged, before the Court at least, not until the commencement of trial. The Court considers that they have, in effect, been abandoned; or, in any event, the Court finds no merit to them and overrules and denies all of them. At the commencement of the trial, it was stipulated either, (1) that all matters not tried to the jury would be decided by the Court, or, (2) that the Court would decide the questions involving indemnity as between Union Oil Company and Diamond M.

The plaintiff was a welder employee of Diamond M Drilling Company. At the time he was injured, on December 31, 1977, he was working on an oil drilling, jackup type, movable barge rig located some 80-90 miles off Freeport, Texas, in what was offshore Texas waters in the Gulf of Mexico. The parties stipulate or acknowledge that plaintiff was a "Jones Act seaman."

The original contract herein was entered into between Mobil Oil Company and Diamond M Company in February of 1977 for the purpose of drilling in offshore Louisiana waters by Diamond M Drilling Company. Diamond M owned the jackup rig designated #99, its appurtenances, tackle and equipment, etc. Diamond M employees also manned the rig in the drilling operations, all as much particularly shown by the contract, a copy of which is included in the record. The one exception to the above is that Union Oil furnished the some 200 feet or so of the Drive Pipe, as well as the Drill Guide. The plaintiff was injured while he was working on the Drill Guide.

In August of 1977, Diamond M, Mobil Oil, and Union Oil Company of California, (the former and latter defendants herein) entered into an agreement whereby Mobil permitted Diamond M. to drill the number one well in the Union-Mobil High Island Block A-433 area, with Union as operator. This is in the area off the coast of Texas referred to hereinabove. Rather than drawing up a new contract, the parties, Diamond M and Union; agreed by letter, to all the terms and conditions of the contract between Mobil and Diamond M. Copies of these letters are contained in the record.

The contract was handled through the offices of Union Oil and of Diamond M both located in Houston, Texas. The original contract was also handled through the Houston, Texas offices of Mobil and Diamond M. Whereas the original contract was for the purpose of drilling oil wells off the coast of Louisiana, the Union Oil contract with Diamond M was for the purpose of drilling a well off the coast of Texas in the High Island area off Freeport, Texas.

The employee, plaintiff herein Delton Cason, sued his

employer, Diamond M, both under the Jones Act and under the admiralty doctrine of unseaworthiness of the vessel. The parties concede, and the evidence shows, the maritime nature of the employment, and the applicability of the Jones Act, Admiralty principles of law, and General Maritime principles of negligence. Cason sued the defendant, Union Oil Company, by means of a supplemental and amending petition under the General Maritime Law alleging negligence of Union Oil Company. The jury found the plaintiff's damages to be in the sum of $493,000.00. They found that there was negligence under the Jones Act on the part of defendant, Diamond M. They found in favor of Diamond M on the question of unseaworthiness of its vessel, Rig #99. The jury further found negligence under the General Maritime Law on the part of the defendant Union Oil Company. They found, under the comparative negligence doctrine, that the plaintiff's negligence contributed 10 percent to his own injuries.

Upon being sent back a second time with instructions to apportion the negligence of the defendants, Diamond M, and Union Oil, the jury found 60 percent negligence attributable to Diamond M; and 40 percent negligence attributable to Union Oil.

QUESTIONS FOR THE COURT TO DECIDE

The first question for the Court to decide is whether or not to award pre-judgment interest against Diamond M and against Union Oil Company. Secondly, the question the Court is required to decide, is the indemnification question as between Union Oil and Diamond M. Further, if necessary, the Court is to decide whether or not Union Oil should recover from Diamond M under the theory that Union Oil's negligence, if any, was passive, and Diamond M's negligence was active, and; therefore, should result in Union Oil's

recovering from Diamond M even if the indemnification agreement were found to be invalid.

The parties all apparently concede that there is no recovery of pre-judgment interest under the Jones Act. The cases cited hereinafter on pre-judgment interest as to Union Oil establish this clearly.

With respect to pre-judgment interest as to Union Oil, the law provides, as all parties agree, that it is entirely discretionary with the Court whether to allow pre-judgment interest.

Generally in maritime matters, pre-judgment interest is not allowed. In Admiralty matters and in General Maritime Law, it is within the discretion of the Court. In this particular case, the plaintiff returned to work some seven or nine months after being injured and has been employable since that time. Since February of 1979, he has been employed as a logger with his father in North Louisiana working with a power saw cutting trees and trimming them preparatory to their being hauled out of the forest. He has made very good money at this occupation, having earned in the neighborhood of $22,000.00-$23,000.00 during the year 1980. The Court would further consider that the jury's award of $493,000.00, to be diminished by plaintiff's apportioned negligence to an award of approximately $450,000.00, is entirely adequate for the plaintiff's injuries, suffering, disabilities, and losses. His award is adequate to say the least, if not considerably on the high side. Additionally, delays herein cannot be attributed to defendants. Considering all of these circumstances, the Court will order that interest on the judgment, as against Union Oil, as well as against Diamond M, will run from time of judgment. *Pellegrin v. Fidelity & Casualty Co. of New York*, 193 So.

2d 392; *Ferdinandtsen v. Delta Marine Drilling Company*, 235 So. 2d 641; *Hebert v. Diamond M*, 385 So. 2d 410; *Doucet v. Wheless Drilling Company*, 467 F.2d 336 (1972); *Barton v. Zapata Offshore Company*, 397 F.Supp. 778 (1975); *Aymond v. Texaco, Inc.*, 554 F.2d 206 (1977) and *Parisi v. Lady In Blue, Inc.*, 433 F.Supp. 681 (1977).

The Parisi case cited last indicates that a jury must determine whether or not to award pre-judgment interest. At this moment (the transcript not having been typed yet) the Court is not aware of whether or not the parties left all questions, not directly left to the jury, to the trial judge's decision, or whether the parties merely left, to the trial judge's decision, the one question of indemnification. If the latter, then the failure to present the pre-judgment interest question to the jury under *Parisi* above would result in denying pre-judgment interest to the plaintiff. In the event that all matters were presented to the trial judge for decision that were not directly decided by the jury, then the Court's decision above denies pre-judgment interest as against Union. In any event, plaintiff would lose as to this claimed item of damages.

UNION OIL'S CLAIM FOR INDEMNIFICATION

The next question for decision by the Court is the question of Union Oil's claim for indemnification. The Court considers that the first matter to be decided is as to which law is to be applied in this instance.

With respect to the law to be applied, the Court agrees with and reproduces here a paragraph from the brief of counsel for Diamond M and I quote:

"In the case of *J. Ray McDermott & Co., Inc. v.*

Fidelity & Cas. Co. of New York, 466 F.Supp. 353 (D.C. La), the Court held that Texas law would apply to a contract for construction and installation of an offshore platform that was to be performed in the offshore waters of Texas. See also *Bolin Farms v. American Cotton Shippers Assn.*, 370 F.Supp. 1353, affirmed, 505 F.2d 732, which held under Louisiana Article 10, the general rule is that validity and construction of a contract is determined by *lex loci contractus* and the remedy to *lex fori*."

The Court considers and feels that all attorneys agree with the Court that Texas law, insofar as it is not in conflict with the Jones Act, Admiralty Law, and general principles of Maritime Law, is to be applied herein. The contracts were made by two foreign corporations neither of whom were domiciled in Texas or Louisiana. Both the original and the supplemental contracts and negotiations for the same were, from the evidence, conducted in Houston, Texas. The accident causing the injuries complained of herein occurred offshore from Texas. State law can be applied in matters such as involved herein when not in conflict with or contrary to Admiralty and Maritime Law.

When an admiralty matter is pending in a state court, the action is governed by general admiralty law supplemented and modified by state law, where the application of state laws broaden the scope of liability beyond general maritime standards. See *Beavers v. Butler*, 188 So.2d 725 (La. App. 2nd Cir. 1966); *Rojas v. Robin*, 90 So.2d 58 (S. Ct. 1956); *Jansson v. Swedish American Line*, 185 F.2d 212 (1st Cir. 1950); and *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974). The Court in *St. Hilaire Moye* in deciding the applicable law to be applied in an admiralty

case stated that:

> " 'A federal court sitting in admiralty does not sit as a diversity court; therefore, this is not a case where state substantive law must be ascertained and applied. *Spiller v. Lowe*, 446 F.2d 903, 907, 908n.6 (8th Cir. 1972). Rather, admiralty suits are governed by federal substantive and procedural law. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S.Ct. 306, 3 L. Ed. 2nd 550 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 98 L. Ed. 143 (1953); *Branch v. Schumann*, 445 F.2d 175, 178 (5th Cir. 1971). However, a federal court sitting in admiralty need not 'invariably refuse to recognize and enforce a liability which the state has established in dealing with a maritime subject. On the contrary, there are numerous instances in which the general maritime law has been modified or supplemented by state action...' *Just v. Chambers*, 312 U.S. 383, 387-388, 61 S.Ct. 687, 691, 85 L. Ed. 903 (1941). See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 61 L. Ed. 1086 (1917). Thus, admiralty courts may apply state law by expressed or implied reference or when the federal law of admiralty is incomplete. *Baggett v. Richardson*, 473 F.2d 863, 864 (5th Cir. 1973). See *Tungus v. Skovgaard*, 358, U.S. 588, 594, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). THE SUPREME COURT HAS SUSTAINED THE APPLICATION OF STATE LAWS WHICH BROADEN THE SCOPE OF LIABILITY BEYOND THE GENERAL MARITIME STANDARD. See *Hess v. U.S.*, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed.2d 305 (1960); *Just, supra*. See also M/T. Alva Capte, 405 F.2d 962, 969-970 (2nd Cir. 1969).' "

Counsel for Union Oil takes the position that the

Texas law has not been proven before this Court. Counsel for Diamond M briefed the court extensively on the applicable Texas law prior to the trial of the matter herein citing appropriate sections from that law. Subsequent to the trial, counsel for Diamond M provided the Court with a copy of the Texas statute. A copy is attached hereto and made part of these reasons and marked Exhibit "1". On June 23, 1981, Diamond M Company notified counsel for Union Oil Company that it was withdrawing its offer of tender to defend and indemnify Union in its entirety, Exhibit "D-2".

LSA-C.C.P. Article 1391 reads as follows:

"Art. 1391. Judicial notice of laws

Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

The Court may inform itself of such laws in any manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

The determination of such laws shall be made by the court, and not by the jury, and shall be reviewable.

A party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

> The law of a jurisdiction other than those referred to in the first paragraph of this article shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice."

The case of *Cambre v. St. Paul Fire & Marine Insurance Co.*, 331 So.2d 585 establishes that the law of other states, can be brought to the Court's attention by means of attorney's briefs. This has been done here. The Court considers that the Texas statute is properly before it. The statute in its entirety is attached hereto and made a part of these reasons for judgment. As relevant herein it reads as follows:

> "Art. 2212b. Indemnity provisions in mineral agreements where negligence attributable to indemnitee.
>
> Section 1. The legislature finds that an inequity is fostered on certain contractors by the indemnity provisions contained in some agreements pertaining to wells for oil, gas, or water, or mines for other minerals. It is the intent of the legislature and the purpose of this Act to declare provisions for indemnity in certain agreements where there is negligence attributable to the indemnitee to be against the public policy of the State of Texas.
>
> Section 2. Except as specified in Section 4 of this Act, a covenant, premise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or mine for any mineral, is void and unenforceable if it purports to indemnify the indemnitee against loss or liability for damages arising from either death or bodily injury to persons, or injury to property, or any other loss, damage, or

expense arising from either death or bodily injury, injury to property, or loss, damage, or expense, which is caused by or results from the sole or concurrent negligence of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

Section 3...
Section 4...
Section 4(c). The provisions of Section 2 of this Act shall not apply to any agreement providing for indemnity with respect to claims for personal injury or death to indemnitor's employees or agents, or the employees or agent of indemnitor's sub-contractors *if the parties agree in writing that such indemnity obligation will be supported by available liability insurance coverage to be furnished by indemnitor;* provided however, that such indemnity obligation shall be only to the extent of the coverages and dollar limits of insurance *agreed to be furnished;* but in no event shall said insurance be required in an amount in excess of twelve times state basic limits for bodily injury, approved by the Board of Insurance Commissioners in accordance with Article 5.15 of the Texas Insurance Code. (Emphasis ours)

It can be seen from the foregoing excerpts from the Texas law applicable that as a general rule agreements providing for indemnity, where there is negligence attributable to the indemnitee (in this instance Union) are against the public policy of the State of Texas. Section 4 of the act lists a number of exclusions or exceptions to the provisions of the Act. Section 4 (c) provides that if there is personal injury to indemnitor's employees or agents (Cason - Diamond M's employee here); and, if the parties *agree* that such indemnity obligation will be supported by

available liability insurance coverage to be furnished by indemnitor (Diamond M) that it will be an exception to the general principles of law concerning these agreements. The copy of the contract filed in evidence D-1 "Exhibit B, page 1", of said contract shows that the contract between Mobil and Diamond M (adopted by (Union) provides that Diamond M will carry $100,000.00 per person, and $300,000.00 per accident, for bodily injury liability. Exhibit B page 1 of the contract, as relevant is as follows:

Insurance Requirements
Offshore Contracts
Schedule C

Workmen's compensation ....

Comprehensive General Liability
Bodily Injury Liability
$100,000.00 each person
$300,000.00 each accident

Property Damage Liability ....
Include
1. ....
2. ....
3. ....
4. Contractual liability to cover "hold harmless" clause in our contract.
5. ....
6. ....

Section 14 (contract page 6) provides as follows:

"14. INSURANCE AND INDEMNITY:

14.1 At any and all times during the term of this agreement, Contractor agrees to maintain in force and submit evidence of insurance equal to or in

excess of the requirements detailed in Exhibit B attached hereto and made a part hereof. (Exhibit "B" being the Exhibit "B", page 1, referred to in the preceding paragraph)

14.2 ...

14.3. In the event Contractor is self-insurer and Mobil has consented to Contractor's being a self-insurer as to any one or more of the risks as to which coverage is required, evidence of such consent must be in writing and approved by a representative of Mobil authorized to enter into such consent agreement. It is recognized that Contractor is self-insured for $250,000.00 of Workmen's Compensation and General Liability.

14.4 Contractor shall protect, indemnity and save Mobile harmless against any and all claims, demands and causes of action of every kind and character made against Mobil or in which Mobil may be named party defendant by Contractor's employees, agents, or invitees, on account of personal injury or death, or on account of property damages (other than property damages specifically provided for in paragraphs 6.1, 6.2 and 6.3) occurring, growing out of, incident to, or resulting directly or indirectly from, the work to be performed by Contractor hereunder, irrespective of whether such claims are occasioned, brought about, or caused in whole or in part by the negligence of Mobile, or by the unseaworthiness of the Diamond M 99, and for damages for infringement of any patent as more particularly set forth in Paragraph 22 hereof. (Substitute "Union" for "Mobil" hereinabove).

Section 14.3 is a mutual recognition by the parties to the contract, that contractor is self-insured for $250,000.00 of

workmen's compensation and general liability. It thus appears that there is no insurance for the first $250,000.00 of liability and that the Texas statute would thus negative any indemnity herein as Union's liability, determined by the jury, is in the neighborhood of $180,000.00

The Texas statute however does not require that the insurance for indemnity be actually furnished. A careful reading of Section 4(c) of the Texas Statute, in relevant part, reads as follows:

> "If the parties agree in writing that such indemnity obligation will be supported by available liability insurance coverage to be furnished by indemnitor."

The parties herein Diamond M - Mobil (Union) have agreed in the contract (Exhibit B Page 1) of the contract as shown hereinabove, to carry $100,000.00 for each person for bodily injury liability under comprehensive general liability. It is shown among the matters included and I quote:

> "Number 4. Contractual liability to cover "hold harmless" clause in our contract."

Diamond M has thus contracted with Union Oil to carry $100,000.00 per person on an employee under its indemnity agreement with Union Oil.

It can thus be seen that Section 14.3 of the contract provides for self insurance for $250,000.00 on workmen's compensation and general liability. On the other hand Section "Exhibit B, page 1" of the same contract obligates Diamond M to carry $100,000.00 for each person for bodily injury liability under comprehensive general liability.

Diamond M is the obligor under this contract. Applying generally recognized legal principles which require that ambiguities in a contract be construed against the obligor under the contract, the Court holds that the agreement to carry $100,000.00 per person is valid and of course it is in writing. This is all that Section (4) (c) of Section 2212 b of the Texas law requires as previously shown hereinabove.

In accordance with Subsection 4 (c) of Article 2212 b of the Texas statute this agreement to carry this amount of coverage is valid and is an exception to the statute in its prohibition against any indemnity agreement.

Counsel for Union argues that since the contract between the parties herein contains a general indemnification agreement (Sections 14.1 through 14.4); and, further on, contains a limiting agreement limiting the amount of indemnification per person and per accident to be furnished (Exhibit B page 1 of the contract) that the contract is ambiguous and must be construed against the obligor under the contract. He thus argues that the general provision prevails and the specific provision is invalid. In support of this, he furnishes to the Court an opinion by Judge Peter Beer of the United States District Court of the Eastern District of Louisiana in New Orleans being Civil Action 79-2712 *Joseph Antoine v. Transocean Contractors, Inc., et al.* In this opinion, Judge Beer holds that the general indemnity agreement would prevail over that portion of the contract setting forth specific amounts of indemnity. A copy of Judge Beer's opinion is attached hereto and marked "Exhibit B". Judge Beer in effect goes contrary to the two prior 5th Circuit decisions, cited in his opinion, which held that the specific agreement limited the previous general indemnification agreement. The Court agrees with the Dickerson and Hicks cases rather than with the Antoine

case. It is a general rule of construction as to laws and contracts between parties that if it is possible to construe laws or contracts in such a way that all the provisions thereof are given validity, such a construction is preferable to one which holds invalid sections of the laws or contracts.

The Dickerson and Hicks cases limited indemnity under the general unlimited indemnity of the contract (Section 14 herein) to the specific amount specified in the other portions of the contract (Exhibit B page 1 of contract herein).

Judge Beer finds no conflict in holding the unlimited indemnity provision controlling and not being modified by the specific limiting agreements. He sees no conflict between the two provisions. The writer's opinion is that the Dickerson and Hicks cases reconcile and give meaning to both provisions and that the general agreement is modified by the specific agreement, and adopts the rationale of the two 5th Circuit Court decisions.

The Court therefore holds that Diamond M owes Union Oil $100,000.00 with interest from date of judgment under the indemnity agreements between the parties in accordance with Texas law and with the contract entered into between the parties.

Counsel for Union Oil vigorously argues for judgment for attorney's fees, litigation expenses, investigative expenses and costs incurred by Union in the defense of itself as provided for in the contract. The Court is unable to find in Section 14 of the contract on page 6 or Section B page 1 of the contract, or elsewhere in the contract, any provision for attorney's fees or the other various expenses set forth by counsel for Union Oil. There is no evidence in

the record to support any such charges. The Court feels that it could take judicial notice of the value of attorney's fees and the amount of work by Union's counsel on the request for attorney's fees if the law allowed the Court to do so. The general rule of Louisiana law is that attorney's fees are not granted unless provided for by law or by contract. No such provision of law or the contract has been brought to the Court's attention, therefore, these claims will be denied.

Counsel for Union argues that it is the primary active negligence of Diamond M which caused the injuries complained of herein. They argue that any negligence of Union, through its company man on the rig, was passive negligence. Counsel cites to the Court, *Bourque v. Texaco Oil Company, Inc.*, 578 F.2d 1117 (5th Cir. 1978) which stands for the proposition that a general contractor, who is otherwise free from negligence, and who hires an experienced independent contractor and assigns to that contractor some work, should not be legally responsible for negligent work methods utilized by that contractor.

The law of Louisiana is set forth in the case *Washington v. Degelos*, 312 So.2d 918 (4th Cir. 1975) and on page 922 we find the following language.

> "As the doctrine exists in Louisiana, the right to indemnity from the person primarily negligent exists only in favor of one who is vicariously liable for the damages caused because of merely technical or constructive fault. Appalachian Corp. v. Brooklyn Cooperage Co. cited above; Stewart v. Roosevelt Hotel, La. App. 4 Cir. 170 So.2d 681; American Employers Insurance Co. v. Gulf States U. Co., La. App. 1 Cir. 4 So.2d 628. See also Williams v. Marionneaux, 240 La. 712,

> 124 So.2d 919. The right to indemnity does not exist in favor of a joint tortfeasor whose act or failure in the performance of a duty was a contributory cause of the accident, and there is no right to indemnity where the liability of the one seeking it cannot be regarded as secondary, vicarious, or derivative, Lee v. City of Baton Rouge, 243 La. 850, 147 So.2d 868; Second Church of Christ Scientist v. Spencer, 230 La. 432, La. 88 So.2d 810, discussed at 17 La. L. Rev. 348, 350 (1957); Travelers Insurance Co. v. Hardware Mutual Cas. Co. La. App. 2 Cir., 186 So.2d 185 (rendered April 27, 1966)" 187 So.2d at 802.

Also see *Appalachian Corporation v. Brooklyn Cooperage Co.*, 91 So. 539.

This Court cannot conclude from the trial hereof that the jury found Union Oil Company's representative guilty of passive, derivative, or vicarious or secondary negligence. As the Court states in the citation above "where the liability of the one seeking it (indemnity) cannot be regarded as secondary, vicarious, or derivative". The Court can only conclude from the evidence and from the fact that Union's company man, Dennis Wade Romero, was on the rig, and to some extent participated in the operations being conducted; and that he discussed the activities with the tool pusher for Diamond M; that the jury found him actively negligent. He was put on the stand and the jury heard his testimony. In response to the question as to the extent of his negligence, the jury found his negligence to contribute 40% of the cause of the accident.

If the company man was guilty of any negligence at the scene of this accident, it would have had to be as a result of his failure to properly supervise the activities in

dismantling the well guide. There is no question here of secondary or vicarious or derivative negligence. The Court also feels that counsel for Union Oil, in asking the Court to determine the active versus passive negligence of Union Oil, is asking the Court to usurp the function of the jury in this regard. The Court feels that this was a question which should properly have been presented to the jury as the jury was charged with the duty of determining the negligence of the parties and the percentage thereof to be allocated between the parties. The claim for Union Oil for indemnity on the theory of the passive negligence by Union's representative is therefore denied.

Finally, Union argues that the Texas statute is unconstitutional as to the Texas state constitution and the constitution of the United States. It is posited that it violates the parties' constitutional right to contract; that it is discriminatory in that it applies only to a particular kind of contract; and, that it is a denial of equal protection, both on its face and as applied. Counsel cites no authority nor does the Court know of any to support the contentions of unconstitutionality urged by defendant Union. The Legislature of the State of Texas apparently felt that it was answering a need which had arisen in the drilling of oil, gas, water wells, or mining for other minerals; and, that it was against the public policy for people engaged in such occupations to be indemnified for damages caused by their own misdeeds. The law applies equally to all engaged in such pursuits. The Court finds that the constitutional objections raised herein lack merit.

There will be judgment in accordance with the above and foregoing.

Officially granted and signed at New Iberia,

Louisiana, this 2nd day of September, 1981.

(Signed)
JUDGE

CLERK'S OFFICE, FRANKLIN, LA.
SEP 4, 1981
A true copy of the original
Attest Jane C. Pilant
Dy. Clerk of Court

RECEIVED AND FILED
SEP 4, 1981
Jane C. Pilant
Dy. Clerk of Court

APPENDIX "F"

16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARY
STATE OF LOUISIANA

DELTON CASON

VS. NO. 60,777

DIAMOND M. DRILLING CO., ET AL:

FILED: FEBRUARY 3, 1982
CHRISTINE DIAMOND, DY. CLK.

JUDGMENT

This case came on for trial pursuant to regular assignment on July 6, 1981, and thereafter on a new trial granted to defendant, Union Oil Company, on the issue of liability only, on January 11, 1982. Present at the trial and new trial were William B. Baggett of the firm Baggett, McCall, Singleton & Ranier, attorney of record for plaintiff; Delton Cason, Joseph J. Wiegand, Jr., attorney for the defendant Diamond M Drilling Company, and Mr. Randall Theunissen, attorney of record for the defendant, Union Oil Company of California.

This cause, after having been duly tried before and submitted to the jury, and the jury having returned on July 9, 1981, a verdict in words and figures as follows:

VERDICT OF THE JURY

"1. Was there any negligence under the Jones Act on the part of the defendant, Diamond M, which was the cause of plaintiff's injuries?

Yes X No_____

"2. Was there any unseaworthiness of defendant Diamond M's vessel, RIG 99, which was the proximate cause of plaintiff's injuries?

Yes_____ No X

"3. Was there any negligence under the General Maritime Law on the part of the defendant, Union Oil Company, which was a proximate cause of plaintiff's injuries?

Yes X No_____

"4. What amount of damages, if any, expressed in dollars, did the plaintiff sustain as a result of these injures?

$493,000

"5(a). Was there any negligence on the part of the plaintiff which was the proximate cause of his own injuries?

Yes X No_____

"5(b). If the answer to Question 5(a) is "yes," by what percentage did the plaintiff's negligence contribute to his own injuries?

10%

"Franklin, St. Mary Parish, Louisiana, this 9th day of July, 1981.

s/Don R. Goos
FOREPERSON

"Using 100% as the total amount of negligence by the defendants:

"What percentage of negligence do you attribute to Diamond M.

60%

"What percentage of negligence do you attribute to Union Oil.

40%

s/Don R. Goos
FOREPERSON"

This cause, after having been duly retried before and submitted to the jury solely on the issue of liability of the defendant, Union Oil of California, and the jury having returned on January 14, 1982, a verdict in words and figures as follows:

JURY VERDICT FORM

"1. Was there any negligence under the General Maritime Law on the part of the defendant, Union Oil Company?

Yes_____ No_X_

"2. Was the negligence of Union Oil Company a proximate cause of plaintiff's injuries?

Yes_____ No_____

Franklin, St. Mary Parish, Louisiana, this 14th day of January, 1982.

s/Steve Larcade
FOREPERSON

The original judgment herein, by stipulation of all counsel, reserved from the jury and submitted to the Court the questions of pre-judgment interest on the verdict in favor of Delton Cason and further reserving to the Court, in said stipulation, the question of whether or not indemnity was due Union Oil Company of California against Diamond M Drilling Company. The question of indemnity for Union Oil Company against Diamond M Drilling Company has become moot in the view of the jury's verdict on new trial absolving Union Oil Company of negligence and relieving them of liability. The Court reaffirms its prior denial of prejudgment interest in favor of plaintiff and against Diamond M.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the said verdicts be, and they are hereby made the judgment of this Court. Defendant, Diamond M Drilling Company, is condemned to pay to plaintiff, Delton Cason, the sum of $443,700.00, together with legal interest from July 9, 1981, until paid and all costs of the original proceeding culminating on the verdict of July 19, 1981. All costs attributable to the application for and new trial culminating in the judgment of January 14, 1982 are assessed against plaintiff Delton Cason. Union Oil is absolved from the payment of any Court costs.

IT IS FURTHER ORDERED that the following expert witness fees be taxes as costs;

Paul Montgomery (First trial)	$350.00
Paul Montgomery (Second trial)	$350.00
Don Cornwell	$350.00

JUDGMENT READ, RENDERED AND SIGNED in Chambers at New Iberia, Louisiana, this 2nd day of February, 1982.

(Signed)
DISTRICT JUDGE

RECEIVED AND FILED
FEBRUARY 3, 1982
CHRISTINE DIAMOND
Dy. Clerk of Court